SEP 17 1990

No. 90-298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PRESBYTERY OF SEATTLE,
Petitioner,

v.

KING COUNTY,
Respondent.

On Petition for Writ of Certiorari to the Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION

The American Farm Bureau Federation respectfully moves for leave to file the attached brief *amicus curiae*, pursuant to Supreme Court Rule 36. Respondent King County has refused to grant us consent to file a brief.

MOTION OF AMICUS CURIAE

The American Farm Bureau Federation (AFBF) is a non-profit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF has member state organizations

in all 50 states and Puerto Rico, representing the interests of more than 3.6 million member families.

The protection of private property rights is of paramount importance to farmers and ranchers. Farmers and ranchers are increasingly becoming subject to land-use regulations at the local, state and national levels that either restrict their ability to farm or eliminate that ability altogether. One recent example of the type of regulations that are threatening agricultural production and adversely affect private property rights pertain to "wetlands." Federal, state and local governmental agencies are defining "wetlands" in such a way that lands do not even had to be "wet" to qualify, and are insisting that lands which have already been converted from "wetlands" to farmland now revert to "wetland" status. The net effect of these policies is to take a significant amount of potentially productive and privately owned farmland out of agricultural production.

The Fifth Amendment to the U.S. Constitution prohibits the "taking" of private property for public use without providing just compensation. Governmental land-use and wetlands policies raise important Fifth Amendment "taking" issues as applied to farmers and ranchers. As land-use regulation becomes more pervasive, it is crucial that both the constitutional limitations placed on governments in the exercise of their authority and the protections afforded to regulated landowners be applied in a consistent manner across the country. Governments and landowners alike benefit from consistent applications of Fifth Amendment principles as set forth by this Court.

The decision of the Washington State Supreme Court below represents a radical departure from established Fifth Amendment takings jurisprudence. The analysis of the court below not only is at loggerheads with the long established principles of this Court, but it would render the private property protections of the Fifth Amendment virtually non-existent in land use regulatory situations.

If permitted to stand, the citizens of Washington State would be deprived of the protections of the takings clause in those situations where they are most necessary to preservation of private property rights.

WHEREFORE, Applicant American Farm Bureau Federation prays that its Motion for Leave to file a brief *Amicus Curiae* in favor of the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: September 17, 1990

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation (AFBF) is a non-profit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF has member state organizations in all 50 states and Puerto Rico, representing the interests of more than 3.6 million member families.

The protection of private property rights is of paramount importance to farmers and ranchers. Farmers and ranchers are increasingly becoming subject to land-use

regulations at the local, state and national levels that either restrict their ability to farm or eliminate that ability altogether. One recent example of the type of regulations that are threatening agricultural production and adversely affect private property rights pertain to "wetlands." Federal, state and local governmental agencies are defining "wetlands" in such a way that lands do not even have to be "wet" to quailfy, and are insisting that lands which have already been converted from "wetlands" to farmland now revert to "wetland" status. The net effect of these policies is to take a significant amount of potentially productive and privately owned farmland out of agricultural production.

The Fifth Amendment to the U.S. Constitution prohibits the "taking" of private property for public use without providing just compensation. Governmental land-use and wetlands policies raise important Fifth Amendment "taking" issues as applied to farmers and ranchers. As land-use regulation becomes more pervasive, it is crucial that both the constitutional limitations placed on governments in the exercise of their authority and the protections afforded to regulated landowners be applied in a consistent manner across the country. Governments and landowners alike benefit from consistent applications of Fifth Amendment principles as set forth by this Court.

The decision of the Washington State Supreme Court represents a radical departure from established Fifth Amendment takings jurisprudence. The analysis of the court below not only is at loggerheads with the long established principles of this Court, but it would render the private property protections of the Fifth Amendment virtually non-existent in land use regulatory situations. If permitted to stand, the citizens of Washington State would be deprived of the protections of the takings clause in those situations where they are most necessary to preservation of private property rights.

STATEMENT OF THE CASE

The case is as stated by the Petitioner. We would, however, like to emphasize that the court below based its decision on a construction of federal "takings" law as set forth by the Fifth Amendment and applied by the Fourteenth Amendment, and did not premise its decision on an interpretation of the state Constitution.

Although it might be tempting to characterize the decision as merely affirming the dismissal of the case on the grounds that petitioner failed to exhaust its administrative remedies, and that the Fifth Amendment analysis is merely dicta, in a prefatory note to the decision, the court below said that the issues of exhaustion and taking "are interrelated and cannot be analyzed as separate and distinct inquiries." (Pet., A-6). It is therefore unclear to what extent the flawed takings analysis played in deciding that petitioner had failed to exhaust his administrative remedies.

REASONS FOR GRANTING THE WRIT

I. THE "THRESHOLD INQUIRY" CONCEPT AND DISTINCTIONS BETWEEN SUBSTANTIVE DUE PROCESS ANALYSIS AND FIFTH AMENDMENT TAKINGS ANALYSIS CONFLICTS WITH LONG ESTABLISHED FIFTH AMENDMENT TAKINGS JURISPRUDENCE.

Most constitutional authorities agree that the "modern era" of regulatory takings analysis began in 1922 with the landmark decision of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).[1] Prior to 1922, cases challenging overzealous regulatory exercises of governmental police powers were judged according to standards of substantive due process.[2] In *Pennsylvania Coal*, the Court found that

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[1] See e.g., Settle, Richard L., "Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't", 12 U. Puget Sound L. Rev. 339, 347 (1989).

[2] See e.g., *Mugler v. Kansas*, 123 U.S. 623 (1897).

such overreaching regulation is a "taking" under the Fifth Amendment takings clause. For the past 68 years, this Court and others following its lead have analyzed regulatory issues, such as presented in the case below, according to the "general rule" of *Pennsylvania Coal*" that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[3]

In 1987 this Court decided three cases which sought to clarify certain aspects of the regulatory takings jurisprudence. In one of those cases, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court re-emphasized that "just compensation" is the appropriate remedy when governmental regulation has gone too far and unduly infringed private property rights. Fifth Amendment "regulatory takings" analysis was now more firmly entrenched than ever.

The decision below would change all of this. The general rule of *Pennsylvania Coal* and the past 68 years of Fifth Amendment precedent would no longer apply.[4] Instead, the Washington court conducted a "threshold inquiry" to determine if the regulation "safeguards the public interest in health, safety, the environment or the fiscal integrity of the area." Next, the court stated that it must inquire "whether the regulation destroys one or more of the fundamental attributes of ownership." If a regulation does not infringe one of the attributes of ownership and if it protects the public from one of the listed harms, then "no constitutional 'taking' requiring just compensation exists."

Nowhere in any of the decisions of this Court is this sort of analysis adopted. The opinion cites no United

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[3] 260 U.S. 415.

[4] Under the rule espoused by the court below, it is doubtful that *Pennsylvania Coal* would even be analyzed in Fifth Amendment takings terms.

States Supreme Court case to support the novel idea of a "threshold inquiry" to determine whether or not overzealous regulation should be decided according to substantive due process or the takings clause. It cites no Supreme Court authority to support the criteria for determining such a "threshold inquiry". It can cite no Supreme Court decision to even support the concept of two different categories of judicial analysis.

This analysis departs significantly from that of established takings jurisprudence. *Pennsylvania Coal* and the subsequent 68 years of federal takings law have considered the *degree* to which regulations interfere with private property rights in determining whether a Fifth Amendment taking has occurred. See e.g. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) (setting forth factors to be considered in takings analysis). By contrast, the decision below would consider the *kind* of regulation at issue in determining whether a taking has occurred. This attempt to differentiate regulations subject to the Fifth Amendment takings clause from those that are not represents a radical departure from established Supreme Court Fifth Amendment precedent.[5]

The United States Supreme Court's regulatory taking doctrine is binding on the states. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). As a matter of federal law, the Fifth Amendment takings clause is properly construed by this Court. Any changes in interpretation should be made by this Court not by state courts. Conversely, state courts that interpret federal law in such a radically different way from established federal precedent should be corrected. Not only

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[5] See Stoebuck, "San Diego Gas: Problems, Pitfalls and a Better Way," 25 Wash. U.J. Urb. & Contemp.L. 3, 76-77 (1983). Stoebuck, a leading proponent of this "revisionist" takings doctrine, freely admits that his theory "differs fundamentally and radically" from established Fifth Amendment takings thinking.

does the decision below depart from this Court's regutory taking doctrine, but it directly conflicts with it. The Washington State Court would remove a significant category of regulatory actions from the Fifth Amendment "Takings Clause" analysis, and instead view them according to a substantive due process analysis. For those cases that would be considered according to a substantive due process, the only available remedy is invalidation of the regulation, and not compensation.

The reasoning of the Washington State Court was specifically rejected by *First English Evangelical Lutheran Church v. County of Los Angeles, supra.* The Court held that police power regulation is not only subject to the takings clause, but that "in the event of a taking, the compensation remedy is required by the Constitution." 107 S.Ct. at 2386. In fact, the Court in *First English* expressly reversed a California decision which, as here, sought to limit the application of established regulatory takings doctrine and to limit the availability of the "just compensation" remedy.

This principle was emphatically reiterated just this year in *Preseault v. Interstate Commerce Commission*, 110 U.S. 914 (1990). *Preseault* reiterates the basic tenets of *First English* that just compensation is the remedy mandated by the Constitution for a "taking". ("[The Fifth Amendment] is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (Emphasis in original) (110 S.Ct. at 921.) *Preseault* not only reinforces the viability of the compensation remedy, but also specifies the mechanism (the Tucker Act) for pursuing it.

Both *First English* and *Preseault* appear to reinforce the idea that otherwise valid regulation which unduly infringes private property rights should not be overturned if just compensation" is available. Thus, "just compensation" not only is the remedy, but it is the safety

valve to rescue otherwise valid but overreaching regulation.

The decision below ignores both *First English* and *Presecault*, and is in direct conflict with the principles of those two cases. Rather than view compensation as the way to save overzealous regulation, the court below dismisses the compensation remedy altogether in a significant category of regulatory cases.

Significantly, the Washington State Supreme Court itself realizes that its Fifth Amendment takings analysis conflicts with the decisions of this Court. In *Orion v. State of Washington (Orion II)*, 747 P.2d 1062 (cited extensively in the decision) it was admitted that "Certain aspects of our state regulatory takings doctrine appear to conflict with federal analysis." However, rather than attempting to follow or even reconcile these differences, these conflicts are summarily dismissed as "more linguistic than substantive." [6] As indicated above, that is certainly not true.

This line of argument that began with *Orion II* and that continues with the decision below has been roundly criticized by no less than Richard L. Settle, described by the court below as a "well respected commentator on land use law". Settle writes:

> "The most serious difficulty with the revised rule is its inconsistency with the very minimum standards of federal regulatory taking law it was revised to meet. This is true not only of the revised rule itself, but also of the premise underlying both the ideal rule and the revised rule—that some police power regulation, probably most police power regulation, is not even subject to the taking limitation." [7]

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[6] 747 P. 2d 1079-84.

[7] Settle, "Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't," 12 U. Puget Sound L. Rev. 339, 375 (1989).

While Settle recognizes that the scope of the regulatory takings clause might have once been debatable, he also recognizes that the debate has now been settled. He says:

> "Regardless of its merits, this line of argument was explicitly rejected recently by the United States Supreme Court in *First English Evangelical Lutheran Church v. Los Angeles County.* The Court clearly held that police power regulation is subject to the taking clause and its remedy of inverse condemnation damages. Moreover, the holding was not limited to regulation that does not substantially serve public interests in health, safety, environment, and the fiscal integrity of the community." [8]

The decision below is so fundamentally opposed to this Court's interpretation of the Fifth Amendment as to be tantamount to judicial mutiny. Unless this Court reviews the case below and corrects its analysis, it's reasoning could be adopted in other states. Or it could be embellished further by the Washington courts, as the decision below built on *Orion II.*

II. THE RULE ESTABLISHED BY THE COURT BELOW IS UNWORKABLE.

In addition to being in direct conflict with Fifth Amendment taking jurisprudence established by this Court, the rule set forth by the court below is unworkable. Under the rule, regulatory actions which seek to "prevent harm to public interests in health, safety, the environment or the fiscal integrity of the area" are to be exempt from the takings clause and analyzed in accordance with substantive due process. Regulations that go "beyond preventing a public *harm* and actually enhance a publicly owned right in property" are subject to the takings analysis. It is a distinction of prevention of public harm on the one hand and conferral of a public benefit on the other.

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[8] *Id.*

In our governmental scheme, however, these are merely two sides of the same coin. "Because police power regulations must be substantially related to the advancement of the public health, safety, morals or general welfare, it is axiomatic that the public receives a benefit while the offending regulation is in effect." *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting). Any distinctions between the two are nothing more than a matter of semantics rather than substance. Even the Washington State Court acknowledged this difficulty:

> "We realize that the determination of whether a given regulation seeks to protect the public from harm will not always be an easy decision. Both the conferral of benefit and the prevention of harm are often present in varying degrees." [9]

Nevertheless, the decision below says that this distinction must be made.

Yet, under the Washington State scheme, the manner in which a regulation is characterized becomes of paramount importance, because that characterization will determine how the case is analyzed and what remedy is available. It will pre-occupy judicial time and energy toward resolving artificial differences on how to "package" the case properly, while taking away from the real issues —the effect of the regulation on private property rights.

Yet focusing on the effects of the regulation is exactly what the Constitution requires. "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring). Since at least 1922 it is clear that it is the *effect* of a regulation which courts have considered in takings cases, and not the intent or stated purpose of a regulation.

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[9] Petition, p. A-9, ftn. 15.

As a practical matter, this decision will also create confusion for Washington litigants in determining the proper court to pursue their regulatory taking cases. The federal Tucker Act [28 U.S.C. 1491(a)(1)] provides jurisdiction in the U.S. Claims Court for any claim founded on the Constitution. That jurisdiction is exclusive for claims over $10,000. Moreover, substantive due process claims are properly brought in federal district court. The Tucker Act remedy applies to Fifth Amendment takings claims (*Preseault v. Interstate Commerce Commission*, (110 S.Ct. 914 (1990)), even where the underlying regulation or statute is silent on the compensation issue.

The Washington scheme puts federal litigants in a quandary. Given a fact situation such as the case below, in what court do plaintiffs bring their suit? If that court conducts the required "threshold inquiry" and determines that the case is improperly brought in that court, plaintiffs would have to re-file. Is the second court bound by the "threshold decision" of the first court? What if the second court also conducts a "threshold inquiry," and decides differently than the first court?

III. THE DECISION GOES BEYOND ANY INTERPRETATION OF THE TAKINGS CLAUSE AS DEFINED BY THIS COURT.

The decision below cited this Court's opinion in *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 (187) as support for the proposition that there is a "categorical exclusion" from the takings clause for some exercises of the police power. More specifically, the court below discussed this in terms of holding that there was an exemption from Fifth Amendment takings if the police power was aimed at preventing a public nuisance. While *Keystone* relied to a great extent on the "public interest" purpose of the statute in holding that there was no taking, the Court also made it clear that the "public interest" aspect was only one consideration in a regula-

tory takings analysis, and stopped short of a "public nuisance" exception.

But even if such an exception were part of the takings jurisprudence, this case does not present such a situation. Rather, the police power complained of pertains to the preservation of a certain wetland, which the court had determined to be desired for its wildlife habitat. Thus, although the preservation of this wetland might be a valid exercise of the police power, it is not the type of regulation designed to protect the "public health and safety." Use of the wetland by petitioners certainly would not be a "public nuisance." There is even considerable doubt as to whether the court below even applied its own narrow standard correctly to this case. According to the Washington State Court, only a regulation that "goes beyond preventing a public *harm* and actually enhances a publicly owned right in property" [10] is to come under the Fifth Amendment takings clause. Yet, that seems to be precisely the situation presented in the case below. The ordinance is not aimed at "preventing harm to the community," but in preserving a wetland. Petitioners would not engage in a "public nuisance" *per se* by developing part of that wetland.

The announced intent operation of the ordinance is to preserve the public's interest in that wetland by preventing its alteration. The ordinance both goes beyond the "prevention of harm" and also "protects a publicly held interest" in the wetland. Even under the Washington State Court's limited takings clause applciation, its decision was wrong.

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[10] Petition, p. A-9.

IV. THE COURT BELOW APPLIED AN INCORRECT UNIT OF PROPERTY MEASURE.

The court below based its findings that there was no "taking" because the petitioners had not been deprived of all use of their property.[11] The concept of the "relevant portion" of property to be considered in a takings case has not lent itself to easy definition.

In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), the Court set forth three criteria: the nature of the action, diminution of the property as a whole, and the impact of the action on reasonable investment backed expectations. These criteria are to be applied on a base by case basis.

The application of these criteria in *Penn Central* itself may not produce the same outcome in the present case. Relevant to the *Penn Central* decision were the facts that (1) the property could be used for the purposes for which it had been used in the past, and (2) the ordinance allowed for the transfer of development rights of Penn central to another parcel. Neither of those conditions is present here.

We submit that the three-part analysis of *Penn Central* is really an ad hoc application of the fundamental principle underlying the whole Fifth Amendment Takings issue —whether the regulation is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [12]

Applied to this case and to similar wetland protection cases, we submit that the relevant portion of the parcel to be considered is the area of the wetland itself, rather

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[11] While such a showing might be required to invalidate a police power statute, a finding that there has been a taking requiring compensation might be satisfied with a lesser showing.

[12] *Armstrong v. United States*, 364 U.S. 40, 49 (1959).

than the entire parcel. There is no public harm that the regulation seeks to remedy. Where, as here, the wetland is preserved for wildlife habitat, the interest to be served is a "public benefit" whose cost should be borne by the public at large.

In any event, these kinds of determinations must be made on a case by case basis, dependent on the nature of the regulatory action and the economic harm done.

CONCLUSION

The Fifth Amendment to the U.S. Constitution guarantees private property owners that their property will not be taken for public use without payment of just compensation. The United States Supreme Court, as highest court in the land, is the final authority on what the Fifth Amendment means. Farmers, ranchers and landowners everywhere look to this Court to protect and define the rights guaranteed by the Fifth Amendment.

That final authority as interpreter of our Constitutional rights is undermined when courts like the one below radically depart from established Supreme Court precedent and engage in free-wheeling judicial theorizing that has no basis in this Court. Left unchecked, such radical departures from this Court's jurisprudence will become entrenched in their jurisdictions and possibly spread to other jurisdictions. This threat is even greater when the issues involve protection of private property rights. With the Administration's announced "no net loss of wetlands" policy, the specific issue of whether preservation of such wetlands might be a taking under the Fifth Amendment looms large in many affected jurisdictions.

If permitted to stand, the radical departure of the Washington State Supreme Court could very well create judicial chaos when it collides with established U.S. Supreme Court precedent in other states. At the very least, it has deprived the citizens of the State of Washington

of fundamental Constitutional rights guaranteed by the Fifth Amendment as applied by this Court.

The differences between the Washington view of the Fifth Amendment and the U.S. Supreme Court's view of the Fifth Amendment are too great. This conflict will have to be addressed sooner or later by this Court. It is better to do it sooner so as to remove all doubts. The Petition for Grant of the Writ of Certiorari should be granted.

Respectfully submitted,

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